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Brief of Albright

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IN THE

Supreme Court of the United States

No. 449.

W. P. SMITH, *Plaintiff in Error,*

vs.

ST. LOUIS & SOUTHWESTERN RAILWAY COMPANY OF TEXAS, *Defendant in Error.*

BRIEF FOR PLAINTIFF IN ERROR.

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KEYSTONE PRINTING CO., FT. WORTH

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W. P. SMITH, *Plaintiff in Error,*

vs.

ST. LOUIS & SOUTHWESTERN RAILWAY COMPANY OF TEXAS, *Defendant in Error.*

BRIEF FOR PLAINTIFF IN ERROR.

In error to the Court of Civil Appeals of the Second Supreme Judicial District of Texas, at Fort Worth, Texas, to review a judgment of that Court, reversing and rendering a judgment of the District Court of Tarrant County, Texas, in favor of W. P. Smith, plaintiff, against the St. Louis & South Western Railway Company of Texas, defendant, for the value of a carload of cattle, shipped by plaintiff and five others from Plain Dealing, State of Louisiana, to Fort Worth, State of Texas. Defendant having refused to deliver the cattle upon their arrival at Fort Worth, on account of a general order in force at the date of shipment, recommended by the Live Stock Sanitary Commission of Texas, and promulgated by the Governor of the State, prohibiting the transportation of all cattle, mules or horses into the State of Texas from the State of Louisiana.

The opinion of the Court of Civil Appeals is reported in 49 S. W. Rep., p. 627.

STATEMENT OF THE CASE.

Plaintiff in error brought this suit in the District Court of Tarrant County, Texas, on the 30th day of September, A. D., 1897, against defendant in error, a Texas corporation and a common carrier for hire for the value of forty-six head of cattle.

Plaintiff alleged a delivery for shipment of said cattle to the St. Louis & Southwestern Railway Company, (another common car-

rier for hire) by one R. F. Miller, consignor in a bill of lading issued by said last named company, whereby it had agreed for a compensation of fifty dollars to transport said cattle from Plain Dealing, State of Louisiana, to plaintiff, as consignee at Fort Worth, Texas.

That under said through contract of shipment said last named company received the cattle at Plain Dealing, Louisiana, and transported the same to Texarkana, Texas, and there delivered the same to defendant, its connecting carrier, for shipment and delivery to plaintiff at Fort Worth, Texas. That defendant received said shipment under the bill of lading, so issued by the initial carrier, and brought the cattle to Fort Worth, Texas, and there unloaded the same in its pens.

That plaintiff and five others were the owners of said cattle, and that said owners, immediately upon the arrival of the cattle at Fort Worth, duly tendered the defendant the freight charges thereon, and demanded possession of said cattle; but that defendant refused to deliver said cattle, and had ever since refused to deliver the same to said owners or to plaintiff, whereby said cattle became wholly lost to said owners.

That subsequent to said refusal to deliver by defendant, and before the institution of the suit, said co-owners sold, transferred and assigned their interest in said cattle and in the cause of action sued upon, to plaintiff. (Rec. 1 to 3.)

To plaintiff's petition defendant answered by a general denial, and two special pleas; the first one, involving the principal issue herein, being in substance as follows:

That at and a long time before the alleged contract of shipment was entered into, it was a violation of the laws of Texas to transport or bring Louisiana cattle into the State of Texas; that the cattle involved were Louisiana cattle, and were delivered to a connecting line of defendant at Plain Dealing, Louisiana, on August 27, 1897, and their transportation demanded by plaintiff and his assignors. That prior thereto, and on June 7, 1897, the Live Stock Sanitary Commission of Texas, acting within the scope of its authority, made among others the following orders:

"From this time forth until the 15th day of November, 1897, no cattle, mules or horses are to be transported or driven into the State of Texas from the State of Louisiana. The Live Stock Sanitary Commission of the State of Texas hereby orders that any violation of the aforesaid rules and regulations by moving any cattle, mules or horses out of Louisiana into the State of Texas is contrary to said rules and regulations, and shall be an offense and punishable as provided by the laws of Texas."

Defendant further alleged that said order was immediately thereafter duly published and promulgated according to law, and that the same, and the quarantine rules and regulations therein contained, took effect and were in force from the date of the order.

That plaintiff, and his assignors, had due notice of said order at the time the shipment was made, but that defendant and its connecting carrier, from which said shipment was received, were

without notice of the same; and that defendant did not know of the same until the cattle had arrived at their destination. "That it received said cattle involved in this controversy at Texarkana, Texas, from the carrier which had brought them to that station from Plain Dealing, Louisiana, as it was compelled under the law to do when freight of any character is tendered to it in apparent good order." That after the arrival of said cattle at their destination, defendant for the first time learned of the existence of the 'quarantine regulation' aforesaid; that it immediately made application to the Live Stock Sanitary Commission of Texas, asking its permission to deliver said cattle to plaintiff, which was promptly refused, and said cattle were ordered by said commission to be taken out of the State. That it was thereby compelled by law to return said cattle to the station and to the carrier from which it received them. That said connecting carrier returned the cattle to Plain Dealing, Louisiana, and there tendered them to plaintiff and his assignors, but that said tender was wholly declined. That plaintiff's own acts in knowingly violating the laws of Texas contributed to and brought about the injury, if any, complained of, and even though defendant should be charged with notice, plaintiff was not entitled to recover. (Rec. 4 and 5.)

Defendant's second special plea set up a limitation in the bill of lading, wherein it stipulated that, in the event of loss or damage to the cattle the measure of damages should be the market value of the cattle at time and place of shipment, that is, Plain Dealing, Louisiana. It further pleaded by way of set-off, the sum of fifty dollars freight charges, and the sum of ninety-one dollars, charges for feeding and taking care of said cattle. (Rec. 5 and 6.)

To defendant's first special plea, plaintiff answered by supplemental petition, and both by special exceptions and special pleas, challenged the sufficiency of its said plea, justifying its acts in refusing to deliver said cattle to the owners, and alleged that said order of the Live Stock Sanitary Commission of Texas, if construed as contended for by defendant, was in violation of Section 8 of Article I of the Constitution of the United States, and an attempt to regulate and impose restrictions upon commerce between the State of Louisiana and the State of Texas. That defendant's answer failed to show that the cattle in controversy were afflicted with the disease of Charbon or Anthrax, as named in the order of said commission, and pleaded affirmatively, that in truth and in fact, said cattle were not afflicted with disease, but were in all respects sound and healthy. (Rec. p. 6.)

Plaintiff also excepted to the defendant's plea, setting up the stipulation in the bill of lading, limiting the measure of damages to the market value of the cattle at time and place of shipment, and alleged that the same was void as against public policy and the laws of Texas. (Rec. p. 7.)

Upon the issues thus joined, the case was tried by the Court without a jury, and judgment rendered for the plaintiff for the market value of the cattle at Fort Worth, less the freight charges. (Rec. 7 and 8.)

Defendant filed its motion for a new trial, and the same being overruled it perfected its appeal to the Court of Civil Appeals of the Second Supreme Judicial District of Texas, assigning error on the trial Court's conclusions of fact and law. (Motion for new trial, Rec. p. 13; order on same, Rec. p. 14; Appeal Bond p. 14; assignment of errors 15 to 17.)

There being no statement of facts in the record, nor requests for additional findings. Nor were any of the findings either of fact or law excepted to.

The Trial Court's conclusions were as follows:

1. I find that the shipment of cattle in controversy was upon a through bill of lading issued by the St. Louis & Southwestern Railway Company, and that Plain Dealing, La., was the initial point of shipment, and Fort Worth, Tarrant County, Texas, the point of destination.

2. The defendant, the St. Louis & Southwestern Railway Company of Texas, connected with the former named railroad at Texarkana, Texas, and the cattle were delivered to defendant at Texarkana by the connecting line, and the same was a through and continuous shipment from said Plain Dealing, La., to place of destination.

3. The bill of lading was executed on the 27th day of August, 1897, and the cattle reached Fort Worth on the evening of the 28th of said month, and upon their arrival the owners were ready to receive the same, and the said owners, at Fort Worth, Texas, tendered the amount of freight, to-wit: $50, to the defendant railroad company, and demanded the cattle, and the said tender of freight charges and demand for the delivery of the cattle at Fort Worth, Texas, was refused by defendant.

4. The cattle remained in the pens of defendant until August 31, 1897, and the stock yards at Fort Worth refused to receive said cattle in their pens, on account of the proclamation of the Governor of Texas, quarantining Louisiana cattle; and defendant also made application to the Live Stock Sanitary Commission of Texas for permission to deliver said cattle to the owners thereof, and, on account of the Governor's proclamation against Louisiana cattle, the same was refused; and thereafter said defendant shipped said cattle back to Texarkana, Texas, and there delivered them to the line of railway from which defendant received them, which line returned said cattle to Plain Dealing, Louisiana, and there tendered said cattle to the shippers, who refused to receive them; and said line, after properly advertising them at the place from which they were received, sold said cattle, and tendered $299.20, the proceeds thereof, less pasturage at Plain Dealing, Louisiana, to the owners of said cattle, which also was refused.

5. At the time said cattle were received at Plain Dealing, Louisiana, and at the time of their arrival at Fort Worth, and the tender of freight charges made to the defendant by the owners of the cattle, the Live Stock Sanitary Commission had recommended the adoption of the following regulations with reference to Louisiana cattle: "The Texas Live Stock Commission has

reason to believe that Charbon or Anthrax has, or is liable to break out in the State of Louisiana, and from this time forth until the 15th day of November, 1897, no cattle, mules or horses are to be transported or driven into the State of Texas from the State of Louisiana." And C. A. Culberson, Governor of Texas, on the 5th day of June, 1897, in conformity with law, regularly promulgated said order and regulations of said commission by proclamation (a full copy of which is hereto attached and made a part hereof); and the quarantine thereby established against cattle in Louisiana was in full force at the time of the shipment in question, if the same was a valid quarantine regulation.

6. The bill of lading under which said cattle were shipped contained in the following stipulations: "That in case of a total loss of any of the live stock covered by this contract for any cause for which the first party will be liable, payment thereof will be made on the basis of actual cash value at the time and place of shipment, but in no case to exceed $100 for each horse, pony, gelding, mare, stallion, mule or jack; $50 for each ox, $30 for each cow, $10 for each calf or hog, $3 for each sheep or goat; and in case of injury or partial loss, the amount of damages claimed was not to exceed the same proportion." The contract for the shipment of said cattle was in writing and signed by the carrier, and also by R. F. Miller, shipper, who acted for himself and as agent for the other owners of the cattle shipped; and, among other things, said contract contains the following agreement: "That, for the consideration and for the covenants and conditions therein contained, the said first party (meaning the initial carrier) will transport for the said second party the live stock described below, and the parties in charge thereof, as hereinafter provided, viz., one car said to contain forty-six head of stock cattle from Plain Dealing, Louisiana station, to Fort Worth station, consigned to W. P. Smith, at the rate of $50 per car from Plain Dealing, Louisiana, to Fort Worth, Texas, subject to the minimum weights and length of car specified and provided for in tariff; said rate being less than the rate charged for shipments transported at carrier's risk; for which reduced rate and other considerations, it is mutually agreed between the parties hereto as follows: First: It is mutually agreed that, if the destination of such cars be beyond the line of the initial carrier, then said initial carrier agrees, and it and each connecting carrier in turn is hereby authorized to deliver said car to its connecting carrier for transportation, under the terms, stipulations, limitations and agreements herein contained; and each and every carrier receiving said cars for transportation shall be deemed to adopt the terms and conditions hereof, and assume the like liabilities, and shall be entitled to all the provisions, exemptions from, and limitations of liability, and other stipulations, covering the measure and adjustment of damages herein contained. "I further find that said cattle were traded for in exchange for horses and mules, no money being paid for them, and were shipped after the promulgation establishing the quarantine regulations above mentioned.

7. All the interest of the shippers and owners of said cattle, and proceeds thereof, and all the claims arising out of the transaction involved in this suit, had been transferred before suit, by the respective owners of said cattle, to-wit: S. P. Clark, W. A. Madox, H. P. Miller, J. S. Collier and J. A. J. Reeves, to the plaintiff herein, and he is now the owner of all claims arising therefrom; and said cattle were Louisiana cattle, traded for in and around Plain Dealing, Louisiana, and, at the time they were received by defendant at Texarkana, defendant had no actual notice of the orders of the Live Stock Sanitary Commission and the Governor's proclamation, but the owners of said cattle did have actual knowledge of the promulgation of the above mentioned proclamation by the Governor.

8. It is agreed in this cause, by written agreement on file, that there were forty-six head of cattle comprehended in this shipment, of age and character as follows: Eighteen cows, six of which had calves following them; seven one-year-old steers; three heifers, two years old each; six two-year-old steers; one heifer one year old; one bull, two years old; one bull, three years old, and one four years old; and two three-year-old steers. And I further find that the actual fair market value of said cattle at the time of their arrival at Fort Worth, and the refusal of the tender of the freight charges, in the Fort Worth market, was the sum of $610. And I further find that the amount of freight due defendant is the sum of $50.

9. The actual cash fair market value of said cattle at the time and place of shipment, to-wit, Plain Dealing, Louisiana, was the sum of $299.20.

10. Defendant Railway Company and its connecting line at Texarkana are common carrier for hire. (Rec. p. 8 to 11.)

(EXHIBIT A.)

The proclamation of the Governor (Exhibit A) referred to, is as follows: "Whereas, the Live Stock Sanitary Commission of Texas has this day recommended the adoption of the following regulations: 'The Live Stock Sanitary Commission of the State of Texas has been reliably informed that the cattle, mules and horses in the southern portion of Jefferson County, State of Texas are affected with disease, known as 'Charbon' or 'Anthrax,' and are liable to impart such disease to cattle, mules or horses ranging in upper portion of Jefferson and other counties. From this time forth; to the 15th day of November, 1897, no cattle, mules, or horses are to be transported or driven north or west of Taylor and Salt Bayous, said bayous running across the southern portion of Jefferson County, State of Texas. This order is given for the purpose of quarantining all cattle, mules and horses south and east of Taylor and Salt Bayous."

"The Texas Live Stock Commission has reason to believe that Charbon or Anthrax has or is liable to break out in the State of Lou-

isiana. From this time forth, until the 15th day of November, 1897, no cattle, mules or horses are to be transported or driven into the State of Texas from the State of Louisiana. The Live Stock Sanitary Commission of the State of Texas hereby order that any violation of any of the aforesaid rules and regulations, by moving of any cattle, mules or horses north of said bayous, or out of Louisiana, into the State of Texas, is contrary to said rules and regulations, and shall be an offense, and punishable as provided by the laws of the State of Texas.

"Now, Therefore, I, C. A. Culberson, Governor of Texas, in conformity with the provisions of chapter 7, title 102, of the Revised Statutes of Texas of 1895, do hereby declare that the quarantine lines, rules and regulations set forth in the above recited order of the Live Stock Sanitay Commission of Texas shall be in full force and effect from and after this date. In witness whereof, I have hereunto set my hand, and caused the seal of the State to be affixed, at Austin, this 5th day of June, A. D., 1897. C. A. Culberson, Governor of Texas." (Rec. p. 12.)

The Trial Court found the following conclusions of law:

1. "The quarantine regulation above mentioned, established by the Governor of the State, is a regulation of or an interference with interstate commerce, in that its effect is to prohibit the importation of all cattle from the State of Louisiana into the State of Texas, whether affected with or capable of communicating the disease mentioned in said proclamation or not, and it is therefore void, as being in contravention of Section 8, of Article I, of the Constitution of the United States. Had the Live Stock Sanitary Commission of the State found upon investigation that Charbon or Anthrax had broken out among the entire cattle of the State of Louisiana, and that all cattle of the State of Louisiana were liable to communicate either of said diseases to cattle of the State of Texas, and had said proclamation of the Governor been based upon said finding, then I think it would have been in law a police regulation of no greater scope than necessary to the protection of cattle in the State of Texas, and therefore valid, even though it did interfere with interstate commerce.

2. The stipulation into the contract of shipment, limiting the damages in case of total loss of cattle to the actual cash value thereof at the time and place of shipment to a fixed sum per head is contrary to law, and therefore void; the correct measure of damages in such cases being the reasonable market value of the cattle so lost at the point of destination.

3. The plaintiff is entitled to recover of the defendant the sum of $610, the value of the cattle lost by him at the time and place of destination, less the sum of $50, freight charges due defendant for said shipment, leaving a balance of $560, together with the interest thereon from August 28, 1897, up to the present time, at the rate of 6 per cent. per annum, making a total of $578.10, and judgment is rendered accordingly." (Rec. 10 and 11.)

The Court of Civil Appeals of Texas sustained the defendants; first assignment of error, complaining of the Trial Court's first

conclusion of law wherein it held the defendant's plea, justifying the alleged conversion of the cattle by reason of the order of the Live Stock Sanitary Comission of Texas, bad, as in conflict with the Commerce Clause of the Constitution of the United States, and reversed and rendered the case for defendant. See opinion of Court of Civil Appeals. (Rec. 19 to 29.)

Plaintiff thereupon filed his motion for a rehearing, as required by the rules of practice of Texas (Rec. p. 30-32) and the same being refused (Rec. p. 32) he made application to the Supreme Court of Texas, for a writ of error, and this being refused (Rec. p. 32, 33), he applied for, and was granted, a writ of error from this Court by the Chief Justice of said Court of Civil Appeals of Texas (Rec. 35, 36), and brings this case to this Court for revision and correction upon the errors assigned.

First Assignment of Error.

The Honorable Court of Civil Appeals erred in sustaining Appellant's first assignment of error, and in holding that the alleged recommendation adopted by the Live Stock Sanitary Commission of the State of Texas, prohibiting the importation of all cattle, mules and horses from the State of Louisiana into the State of Texas from the 6th day of June, 1897, to the 15th day of November of said year, and the proclamation of the Governor of Texas, putting said recommendation in force as set forth in said proclamation, as appears from a copy of the same and identified as "Exhibit A" in the record and set out in the Court's opinion (herein) was not a burden upon and an undue interference with commerce between the said State of Louisiana and the State of Texas, and an invasion of the powers of congress to regulate commerce between the said two States. (Rec., p. 37.)

Second Assignment of Error:

The Court erred in impliedly holding that the recommendation of the said Live Stock Sanitary Commission above mentioned was a quarantine measure within the police power of the State to adopt and enforce. (Rec., p. 37.)

PROPOSITION UNDER THE PRECEDING ASSIGNMENTS:

The finding by the Live Stock Sanitary Commission of Texas, that it "has reason to believe that Charbon or Anthrax has or is liable to break out in the State of Louisiana," could not, under the most liberal construction justify its executive in enforcing an absotute embargo against the importation of all Louisiana cattle. The attempted exercise of such a power under the state of facts shown is void,

as in conflict with Clause 3, Section 8, Article I, of the Constitution of the United States, empowering congress to regulate commerce among the several States, and for the following reasons:

First. **It is not a quarantine order in any just and legal sense.**

Second. **It makes no provision for inspection or examination to prevent discrimination against cattle not afflicted with or capable of communicating the disease named.**

Third. **It passes beyond all reasonable and necessary measures to protect the live stock industry of the State.**

Fourth. **Its effect is to discriminate in favor of Texas cattle as against the cattle of Louisiana, under the pretense of exercising its police power for sanitary purposes.**

Fifth. **It shows to have been improvidently made. It is not based upon facts, but upon a mere rumor, to-wit:**

"The Texas Live Stock Commission has reason to believe that Charbon has or is liable to break out in the State of Louisiana," and for that reason violates a well settled rule of limitation, which forbids any interference by the States with interstate commerce, except upon the highest grounds of public necessity, to be invoked and exercised in a proper manner and under a state of facts authorizing the just application of the spirits of the maxim "the safety of the people is the supreme law."

Sixth. **The natural and reasonable effect of said order is not only to prohibit the importation of all cattle, mules or horses raised or kept in Louisiana, but to prohibit their transportation across that State from beyond its borders. It matters not where the shipment may have originated, provided the highways of the two States were to be used for the purpose of effecting the shipment.**

STATEMENT.

(See exhibit "A," proclamation in full, page 6 of this brief.)

AUTHORITIES

Railway Company vs. Husen, 95 U. S., 168.
Henderson et al., vs. Mayor of New York, et al., 92 U. S., 265.
Schollenberger vs. Pennsylvania, 171 U. S., 4
Bowman vs. Chicago & Northwestern Railway Company, 125, U. S., 473.

Leisey vs. Hardin, 135 U. S., 100.
Scott vs. Donald, 165 U. S., 59.
Morgan vs. Louisiana, 118 U. S., 445.
Muggler vs. Kansas, 123 U. S., 623.

ARGUMENT.

May it please the Court: Articles 5043a and 5043b of the Revised Statutes of Texas, 1895, provide for the creation and qualification of a Live Stock Sanitary Commission of the State of Texas to consist of three members appointed by the Governor of the State.

By Article 5043c it is made the duty of the commission to "protect the domestic animals from all contagious or infectious diseases of a malignant character, whether said disease exists in Texas or elsewhere; and for this purpose they are authorized and empowered to establish, maintain and enforce such quarantine lines and sanitary rules and regulations as they may deem necessary. It shall also be the duty of said commission to co-operate with the Live Stock Commissioners and officers of other States and Territories, and with the United States Secretary of Agriculture, in establishing such interstate quarantine lines, rules and regulations as shall best protect the live stock industry of this State against Texas or Splenetic fever."

Article 5043d provides for the enforcement of the orders and regulations adopted by the commission by proclamation of the Governor of the State:

Article 5043 i authorizes the commission to call upon any Sheriff, Deputy Sheriff or Constable to execute their orders, and provides that such officers shall obey their orders.

An examination therefore of the preceding provisions of the Texas Statutes will disclose that the authority to establish the quarantine, so called, in the present case, was exercised under the first clause of Article 5043c; as the only conditions under which the commission is empowered to co-operate with the authorities of other states and Territories or with the Secretary of Agriculture of the United States, are those where it is thought necessary to protect against Texas or Splenetic fever.

As plaintiff in error must concede in this Court, that the power to establish and enforce the order in question was vested in the Live Stock Sanitary Commission of Texas, in so far as the State of Texas could confer such authority, this issue we believe is therefore directly presented.

May the State of Texas under the finding made by its Live Stock Sanitary Commission, in this case absolutely prohibit the importation of all cattle, mules or horses from another State without making any provision for quarantine and inspection, or providing any methed whatever for a determination of the question as to whether the facts exist, justifying it in suspending the right and privilege of engaging in that business?

In the light of the decisions above cited we respectfully submit there can be but one answer.

In the course of the opinion of the Honorable Court of Civil Appeals (Rec. p. 28) it is said: "The facts in the case are not disputed. The plaintiff sues as for a conversion because of a refusal to deliver his cattle at Fort Worth: It is necessary to his recovery that he show that it was the legal duty of the defendant to make such delivery. It is for the breach of this duty he sues; yet it nowhere appears from the record that before the quarantine line in question was established the Sanitary Commission did not make the most careful and thorough investigation into the necessity therefor, if, indeed, that matter could in any event be inquired into.

So far as the record shows every animal of the kind prohibited in the State of Louisiana may have been actually afflicted with Charbon or Anthrax."

We understand the Court to mean from the foregoing, not that the presumption arises, that all cattle, mules and horses in the State of Louisiana were afflicted with the disease of Anthrax or Charbon, but that it should have been shown by plaintiff such was not their condition before the authority of the Commission to enforce the order contained in the Governor's proclamation, could be assailed by him.

There exists, we believe, two fatal objections to this position. The first is, the power to regulate or in anywise interfere with commerce among the States is vested primarily, and in general exclusively, with the authorities of the Federal Government, acting under the laws of Congress. If this power may ever be exercised by a State in any state of case, it can only be when the danger is so imminent and of a character so fatal, as to preclude the adoption of any other known means less than absolute prohibition to avert injury to its inhabitants, or their property; therefore, while not admitting that this exception in favor of the States has ever been expressly recognized in any given case, certainly if it does exist, one setting up a right by virtue of such an authority, will, in every instance, be held to show a state of facts creating ground for exception. The argument of the learned Chief Justice of the Court of Civil Appeals, would, if followed, lead to this conclusion. It would be to say to plaintiff in error, it is true the right you claim is one directly protected by the Constitution of the United States, yet in extreme cases an exception may exist authorizing the State of Texas to suspend this right; you have not shown that this exception does not exist—this we submit is not the law. If, however, proof were required to show that the order of the commission, as promulgated by the Governor of Texas, was not supported by any evidence tending to establish such general prevalence of the disease named in the State of Louisiana, it is to be found in the language of the order, as follows: "The Texas Live Stock Commission has reason to believe that Charbon or Anthrax has or is liable to break out in the State of Louisiana." What, may it please, is the reasonable and natural inference to

be drawn from this language? Certainly nothing more than the Commission had been reliably informed that *somewhere* in the State of Louisiana the diseases named had or was about to break out.

We believe this Court will, if it should accede the authority to exist under such a finding, announce a doctrine not supported by any of its decisions heretofore published.

We believe this case to be controlled by the principles announced in the case of the Railway Co. vs. Husen, supra, and which have been so often cited with apparent approval by this Court in the later cases

It may be possible, had it been shown in that case, that during certain months of the year the disease called in the Missouri statute, "Spanish or Texas Fever," now generally known as "Texas or Splenetic Fever," would inevitably be communicated to the cattle of Missouri as a result of the importation of Texas, Mexican, or Indian cattle into the State of Missouri during the period named in the Missouri statute, it might have fallen within, and been controlled by, the doctrine enunciated in the later cases of Kimmish vs. Ball, 129 U. S., 217, and M. K. & T. Ry. vs. Haber, 169 U. S., 613.; also Hennington vs. Georgia, 163 U. S., 300.

Still we do not believe the rule of limitation announced in that decision and so often quoted, has ever been modified or questioned.

It is true in the case of Morgan vs. Louisiana, 118 U. S. p. 463, it is said, in construing the statute of Louisiana involved in that case, that "undoubtedly it (the statute) is in some sense a regulation of commerce. It arrests a vessel on a voyage which may have been a long one. It may affect commerce among the States when the vessel is coming from some other State of the Union than Louisiana and it may affect commerce with foreign nations when the vessel arrested comes from a foreign port. This interruption of the voyage may be for days or for weeks. It extends to the vessel, the cargo, the officers and seamen, and the passengers." Nevertheless the statute was upheld for it was, in fact, a quarantine regulation, not shown to have been unreasonable or unlike similar regulations in force in every port of the world requiring the adoption of such measures.

The order of the Live Stock Sanitary Commission of Texas is not a quarantine measure, it is simply prohibition.

May it please the Court: There is one other observation of the Court of Civil Appeals we believe should be noticed. After referring to the fact that plaintiff in error had notice of the quarantine and defendant had not, the Court says, "It was also shown that after such notice was brought home to appellant it sought permission of the Sanitary Commission to deliver the cattle. The Sanitary Commission ruled and ordered otherwise. (Rec. p. 28.) This conclusion of fact as announced by the Court of Civil Appeals, we submit is not borne out by the conclusions of fact made by the Trial Court. The Trial Court in its fourth finding of fact,

states that the stockyards at Fort Worth refused to receive said cattle, and then defendant applied to the Live Stock Commissioner for permission to deliver the cattle to the owner, this the commission refused on account of the Governor's proclamation. See Record pages 8 and 9. The record does not show that the commission took any other notice of the request. It possibly considered that the matter had passed beyond their jurisdiction after the issuance of the proclamation. In connection with the preceding quotation, from the opinion of the Court of Civil Appeals the opinion continues as follows: "In this attitude of the case, appellee insists that it was the legal duty of appellant to deliver the cattle in question, and yet he did not even show that the very cattle for the value of which he sues were free from the disease mentioned. So far as the record before us shows, they may every one have been so affected. We are asked to presume to the contrary." We do not remember to have asked for such a presumption. We supposed, and so far as we understand the position of counsel for defendant, it was thought by them, that their defense must stand or fall by a just interpretation of the language of the finding of the Commission and proclamation of the Governor.

Defendant pleaded the order and proclamation; to its plea plaintiff replied by exception and plea, in substance, that the authority to absolutely prohibit the importation of the cattle in question under the state of facts set forth in the finding and proclamation did not exist, and could not be justified as a reasonable exercise of the police power of the State. That it was void as an obstruction of commerce between the State of Texas and the State of Louisiana. Thus the issue was made and the case tried. No where in the record of the trial Court proceedings is there found even a suggestion that the cattle were suffering with disease of any kind: On the other hand, defendant's answer says "it received said cattle involved in this controversy at Texarkana, Texas, from the carrier which brought them to that station from Plain Dealing, Louisiana, as it was compelled under the law to do when freight of any character is tendered to it in apparent good order." (Rec. p. 5.)

The Trial Court found in its conclusions of fact that there were forty-six head of cattle, a mixed lot, with a market value at Fort Worth of $610 (Rec. p. 10). Certainly, cattle afflicted with the fatal disease of Charbon or Anthrax would not bring their full market value.

If, may it please the Court, the State of Texas may impose restrictions upon the commerce of Louisiana whenever the products of that State are sought to be brought into competition with its own, all that is necessary if defendant's contention in this case be sound, is for it to establish a quarantine, so called, against the Louisiana product by simply having its Governor issue a proclamation declaring his belief or that of some bureau acting in an advisory capacity to the executive department, that the importation into the State of Texas of the Louisiana product would be detrimental to the health or property of the people of Texas. Such an exercise of

authority would be practically to annul the spirit and meaning of the third clause of Section VIII, Article I, of the Constitution of the United States.

The 4th assignment of error presents this issue:

The Court erred in not taking into consideration and in not finding that Congress, by the Act of May 29, 1884, (23, Stat. of L., Chap. 60) known as the "Animal Industry Act," together with the Acts of March 31, 1891 (56 Stat. of L., 1040, 1049, chap. 544), and that of August 8, 1894 (Section 2, chap. 238); also that of April 14, 1896, (chap. 140, p. 108) appropriating money to carry out the provisions of that act, covered substantially the whole subject of transportation from one State to another State, live stock liable to impart or capable of communicating infectious or contagious diseases, and in not holding that the State of Texas had no authority without co-operating with the Secretary of Agriculture of the United States before attempting to adopt quarantine lines between the State of Louisiana and the State of Texas; for appellee says, that by the acts mentioned, Congress had provided for a general system of quarantine and had adopted means for the regulation of shipments of cattle, liable to impart or capable of communicating infectious or contagious diseases, from one State to another. (Rec. p. 37, 38.)

This assignment is urged with the statement that the issue it presents is one, the discussion of which the attorney for plaintiff in error, barely finds courage to venture upon, and that only in a general way.

This Court, has in a number of cases held State legislation, which incidentally affected interstate commerce, a valid exercise of the power and authority of the State to regulate the relative rights and duties of all persons within its jurisdiction so far as to provide for the public good and the public convenience.

A forcible illustration of this recognition we believe to be presented in the two cases of Hennington vs. Georgia, before cited and Lake Shore & Michigan Southern Railway Company vs. State of Ohio. (173 U. S., 286.)

This recognition, however, has almost in every case been accompanied with the statement that when Congress acts with reference to a matter confided to it by the Federal Constitution, then it displaces all State regulations touching the matter. Without attempting an extended discussion of the question presented by this assignment, it seems to us, that the original act mentioned, and the subsequent ones referred to, manifest an unquestioned intention on the part of Congress to confine the power of establishing quarantine lines, to prevent the transportation of cattle affected with a contagious or infectious disease, from one State to another, to a bureau of the Department of Agriculture.

It may be said, that had Congress so intended it would have so stated, explicitly. But it must be understood that while the power of saying, when and where such lines shall exist, may be

exercised by the authorities of the National Government to the exclusion of State authority, the States are not thereby remediless.

The power of eminent domain and of condemnation still rests with the States; though the State may not establish a line across which the right to engage in interstate commerce can be by it suspended after Congress has acted.

May it please the Court:

The amount involved in this controversy is small, the questions raised, however, are believed to be important and serious. Somewhere in the opinions of this Court, it has been said in substance, that the humble character of the litigant before this Court, but to a still higher degree, challanges its close and conscientious attention to the issues involved. To this sentiment, if it may be so denominated, plaintiff in error now appeals with the added statement, that he regrets his inability to have this case presented, in a way that would render the Court greater assistance in determining the issues involved.

We respectfully ask that in the event this Court agrees with the Trial Court on the question involved herein, that the judgment of the Court of Civil Appeals be reversed and that of the District Court of Tarrant County, Texas, be affirmed. The only other issue raised by defendant in the Court of Civil Appeals was its complaint that the Trial Court failed to uphold the stipulation in the bill of lading, limiting the measure of recovery to the value of the cattle at the points of shipment in Louisiana. Such stipulations are held void as against public policy by the Courts of Texas.

Houston & Texas Central Railway Company vs. Davis, 11 Court of Civil Appeals of Texas Reports, page 29, citing Railway Company vs. Maddox, 75 Texas (F. C.), and Railway vs. Ball, 80 Texas (S. C.) 603.

Railway vs. Arnold, 17th Court of Civil Appeals Reports, 74.

Respectfully submitted,

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